

FILED
Court of Appeals
Division II
State of Washington
10/7/2022 8:00 AM

Court of Appeals No.: 56276-6-II

THE COURT OF APPEALS OF THE
STATE OF WASHINGTON
DIVISION II

MARIANNE MONTLER, Respondent/Cross Appellant

v.

FIRST AMERICAN PROPERTY & CASUALTY
INSURANCE CO., Appellant/Cross Respondent

REPLY BRIEF OF APPELLANT/CROSS RESPONDENT
FIRST AMERICAN PROPERTY & CASUALTY
INSURANCE CO.

Robert S. May, WSBA No. 36116
Rmay@kilmerlaw.com
Holly E. Pettit, WSBA No. 46424
Hpettit@kilmerlaw.com
Kilmer, Voorhees, and Laurick, PC
2701 NW Vaughn Street, Suite 780
Portland, Oregon 97210
503-224-0055

Attorneys for Appellant/Cross Respondent First American
Property & Casualty Insurance Co.

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	RESTATEMENT OF ISSUES ON CROSS-APPEAL	5
III.	RESPONSE TO PLAINTIFF’S STATEMENT OF FACTS AND CHALLENGES TO THE TRIAL COURT’S FACUAL FINDINGS	9
A.	Plaintiff Fails to Demonstrate that the Trial Court’s Factual Findings Are Not Supported by Evidence.....	9
B.	The Trial Court’s Finding that Mold in the Home Was Not Caused by the October 2017 Water Loss Event Is Supported by Substantial Evidence.	12
C.	Other Facts Asserted by Plaintiff Are Not Supported by the Trial Court’s Findings, the Record, or Logic.	17
1.	First American’s “Admissions”	18
2.	Loss of Use/Additional Living Expense	20
3.	Damage to Personal Property/Contents	23
IV.	RESPONSE TO CROSS APPEAL	31
A.	Causation and Coverage Were in Dispute.	31
B.	Plaintiff’s First Three Assignments of Error Fail as a Matter of Law, Because the Trial Court’s Findings Are Supported by Substantial Evidence.....	36
1.	Substantial Evidence Supports the Finding that the Prior/Mold Damaged Claimed by Plaintiff Was Not Caused by the October 2017 Event.....	38
2.	Substantial Evidence Supports the Finding that the Appraisal Panel Did Not Make Any Causation Conclusions. .	39
3.	The Trial’s Court’s Finding that Mr. Kester Did Not Address Causation of the Mold He Found in the Home Is Supported by Substantial Evidence.....	41

4. Plaintiff’s Irrelevant and Inaccurate Arguments and Assertions Should be Given No Weight.	43
D. Plaintiff’s Fifth, Sixth, and Seventh Assignments of Error Fail as a Matter of Law, Because the Appraisal Process Did Not Decide Disputed Coverage Issues.	46
1. Appraisal Is Premature When There Is a Causation/Coverage Dispute.	47
2. Coverage and Causation Disputes Were Not Resolved through the Appraisal Process.	52
3. First American Did Not Breach the Insurance Contract or its other Duties.	53
E. Plaintiff Is Not Entitled to Attorney Fees.	57
1. Plaintiff Is Not Entitled to Attorney Fees Under IFCA. ..	57
2. Plaintiff Is Not Entitled to Attorney Fees Under <i>Olympic Steamship</i>	60
V. REPLY ARGUMENT.	62
A. Plaintiff Fails to Demonstrate Any Breach of Contract on Behalf of First American.	62
B. Plaintiff Fails to Establish that She Is Entitled to Any Attorney Fees Pursuant to <i>Olympic Steamship</i>	65
C. The Trial Court’s Factual Findings and Rulings Establish Misrepresentation as a Matter of Law.	66
VI. RESPONSE TO REQUEST FOR ATTORNEY FEES .	73
VII. CONCLUSION.	74

TABLE OF AUTHORITIES

Cases

<i>Baertschi v. Jordan</i> , 68 Wn.2d 478 (1966).....	73
<i>Bainter v. United Pac. Ins. Co.</i> , 50 Wn.App. 242 (1988).....	49
<i>Church Mut. Ins. Co. v. Circle of Light</i> , 416 F. Supp. 3d 847 (E.D. Mo. 2019).....	50
<i>Ellis Ct. Apartments v. State Farm Fire & Cas. Co.</i> , 117 Wn. App. 807, 809 (2003)	63
<i>Fisher Properties, Inc. v. Arden–Mayfair, Inc.</i> , 115 Wn.2d 364, 798 P.2d 799 (1990)	10
<i>Goldstein v. National Fire Ins. Co.</i> , 106 W. 346 (1919) ...	49, 52
<i>Humleker v. Gallagher Bassett Servs. Inc.</i> , 159 Wn.App. 667, 246 P.3d 249 (2011)	65
<i>Hyland v. Millers Nat. Ins. Co.</i> , 91 F.2d 735, 742–43 (9th Cir. 1937).....	52
<i>In re Est. of Palmer</i> , 145 Wn. App. 249, 265–66 (2008).....	9, 38
<i>Kay v. Occidental Life Ins. Co.</i> , 28 Wn.2d 300, 301 (1947)....	75
<i>Keesling v. W. Fire Ins. Co. of Fort Scott, Kansas</i> , 10 Wash. App. 841, 520 P.2d 625 (1974).....	50, 52
<i>Ki Sin Kim v. Allstate Ins. Co.</i> , 153 Wn. App. 339, 354 (2009)	74, 75
<i>Kreml v. Unigard Sec. Ins. Co.</i> , 69 Wn.App. 703, 705–06 (1993)	47
<i>Matter of Est. of L'Amarca</i> , 11 Wn.App.2d 1072 (2020)	29
<i>Matter of Est. of Lint</i> , 135 Wn.2d 518, 531–32 (1998).....	11, 12
<i>McDonald v. State Farm Fire & Cas. Co.</i> , 119 Wn.2d 724, 731 (1992)	37
<i>Mercer Int'l, Inc. v. U.S. Fid. & Guar. Co.</i> , 938 F. Supp. 680 (W.D. Wash. 1996).....	54
<i>Minehart v. Morning Star Boys Ranch, Inc.</i> , 156 Wn. App. 457, 464 (2010)	40
<i>Morse v. Antonellis</i> , 149 Wn.2d 572, 574 (2003).....	29

<i>Munn v. Nat'l Fire Ins. Co. of Hartford</i> , 237 Miss. 641, 644, 115 So. 2d 54 (1959)	52
<i>Onyon v. Truck Ins. Exch.</i> , 859 F.Supp. 1338, 1341 (W.D. Wash. 1994).....	75
<i>Portland Gen. Elec. Co. v. U.S. Bank Tr. Nat. Ass'n as Tr. for Tr. No. 1</i> , 218 F.3d 1085, 1086 (9th Cir. 2000)	52
<i>Rogers v. State Farm Fire & Cas. Co.</i> , 984 So.2d 382 (Ala. 2007)	10, 38, 51, 54
<i>State v. Atchley</i> , 142 Wn. App. 147, 154 (2007).....	10
<i>United Servs. Auto. Ass'n v. Speed</i> , 179 Wn.App. 184, 317 P.3d 532, (2014)	65
<i>Wells v. American States Preferred Ins. Co.</i> , 919 S.W.2d 679 (Tex.App.1996)	51
<i>Wright v. Safeco Ins. Co. of Am.</i> , 124 Wash. App. 263, 273–74 (2004)	46

I. INTRODUCTION

This case involves an attempt by an insured to abuse the appraisal provisions in a homeowners' insurance policy to force her insurer to pay for damages that predate and are not covered by an accepted and covered water loss event. Respondent/Cross Appellant Marianne Montler ("plaintiff") continues to argue that Appellant/Cross Respondent First American Property and Casualty Insurance Co. ("First American") should be required to pay for non-covered, alleged damages, for punitive triple damages, and for plaintiff's attorney fees, despite the trial court's finding that First American promptly and reasonably investigated the loss and paid plaintiff for all covered damages resulting from the October 2017 water loss event.

Plaintiff's arguments largely rely on assertions of fact that differ from the trial court's findings. Plaintiff's alternative facts are not supported by the evidence presented at trial, contrary to the trial court's evaluation and weighing of the evidence, or both. Plaintiff fails to demonstrate that any of the

trial court's factual findings are not supported by substantial evidence. Plaintiff's alternative facts should be rejected by the Court; plaintiff's arguments that rely on those alternative facts likewise should be denied.

Plaintiff's first three assignments of error argue that there is not substantial evidence to support the trial court's finding that the covered water loss event was not the cause of any mold damage in the residence. Plaintiff is incorrect. There is extensive evidence of prior water leaks and water intrusion causing prior damages in the residence, before the October 2017 water loss event. To the extent plaintiff's expert and appraiser concluded differently, the trial court is allowed to weigh the evidence presented at trial and evaluate witnesses' credibility. Those decisions by the trial court should not be reversed by this Court.

Plaintiff next argues that the trial court erred by declining to apply the "efficient proximate cause" rule. This rule does not apply under the circumstances, however. The covered

October 2017 water loss event did not cause or trigger water leaks and intrusions that took place before October 2017, which caused prior damage in the residence.

Plaintiff's next three assignments of error attack the trial court for not "respecting" preliminary rulings made by a prior judge and the appraisal awards. Neither the appraisal awards nor Judge Veljacic's rulings decide the causation/coverage issues in favor of plaintiff, as plaintiff suggests, however. The appraisal award expressly and correctly refrains from making any causation/coverage determinations, in accordance with established law regarding appraisals.

While he ordered appraisal and the continuation of Loss of Use benefits during the pendency of the case, Judge Veljacic also declined to grant summary judgment to either party on the causation/coverage issue, reserving that dispute to be resolved at trial. The trial court resolved that dispute in favor of First American, pursuant to her authority as the trial judge, and in light of the evidence and factual findings presented at trial.

Plaintiff's arguments that she is entitled to attorney fees, either under the Insurance Fair Conduct Act or pursuant to *Olympic Steamship*, fail as a matter of law. Plaintiff did not prevail on her IFCA claim. She did not obtain a judgment in her favor. She did not establish that First American denied coverage or delayed payment for any insurance policy benefits to which plaintiff was entitled.

Instead, the trial court ruled that First American had already paid plaintiff all that she was entitled to receive under the Policy, before the matter was submitted to appraisal. Plaintiff was not the prevailing party on any claim, regardless of whether she prevailed on an intermediary motion in the course of litigation. Plaintiff is not entitled to attorney fees under Washington law.

Plaintiff's responses to First American's assignments of error are unsupported and unpersuasive. Plaintiff fails to demonstrate that First American breached any provision in the insurance contract, given 1) the lack of any damages resulting

from an alleged breach and 2) the lack of duty on the part of First American to submit to appraisal of alleged damages that are not covered by the Policy.

Plaintiff is not entitled to attorney fees, because she did not recover on any claim against First American.

The facts admitted by plaintiff and found by the trial court establish material misrepresentations by plaintiff. The trial court erred by not ruling in First American's favor on its fraud or misrepresentation affirmation defense. In light of those misrepresentations, the trial court's ruling that plaintiff's counsel did not violate CR 11 should be reversed, as well.

Finally, plaintiff is not entitled to attorney fees on appeal.

II. RESTATEMENT OF ISSUES ON CROSS-APPEAL

1. Is the trial court's finding that mold/prior damages claimed by plaintiff were not caused by the October 2017 water loss event supported by substantial evidence?

Answer: Yes. Substantial evidence supports the trial court's conclusion that the water loss event did not cause

mold/prior damage to the insured residence claimed by plaintiff.

2. Is the trial court's finding that the appraisal panel did not decide causation for the damages claimed by plaintiff supported by substantial evidence?

Answer: Yes. The trial court's finding is supported by substantial evidence. The appraisal panel made it clear that the appraisal awards, which were bifurcated into a "Water Damage Appraisal Award" and a "Mold Appraisal Award," did not and were not intended to resolve the contested coverage and causation issues.

3. Is the trial court's finding that Jason Kester's June 2018 Report did not make a conclusion as to causation for the mold and water damage to the Home or its contents supported by substantial evidence?

Answer: Yes. There is substantial evidence that Mr. Kester's June 2018 Report did not address causation of the mold he found in the home.

4. Did the trial court correctly decline to apply the “efficient proximate cause rule” to alleged damages that resulted from causes of loss that predated the covered October 2017 water loss event?

Answer: Yes. The efficient proximate rule is inapplicable under the circumstances of this matter.

5. Did Judge Veljacic decide the coverage and causation issues raised in this matter by ordering and confirming appraisal awards that specifically declined to decide the disputed coverage and causation issues?

Answer: No. Neither Judge Veljacic nor the appraisal panel decided any coverage or causation issues during the appraisal process.

6. Did the trial court correctly rule that First American was not dilatory and paid plaintiff all that was due under the Policy?

Answer: Yes. The trial court’s legal conclusions that First American was not dilatory and paid plaintiff all that she

was due under the Policy are correct and supported by the trial court's factual findings.

7. Did the trial court err by ruling that an appraisal award that expressly declined to decide coverage or causation issues did not decide coverage and causation issues?

Answer: No. The appraisal process correctly and appropriately did not decide coverage and causation issues.

8. Did the trial court correctly rule that plaintiff was not entitled to attorney fees under the Washington Insurance Fair Conduct Act ("IFCA") when the trial ruled that First American had not violated the IFCA?

Answer: Yes. Neither Judge Veljacic nor Judge Sheldrick ruled that First American violated the IFCA. Plaintiff is not entitled to IFCA attorney fees.

9. Did the trial court err in awarding any attorney fees to plaintiff pursuant to *Olympic Steamship*?

Answer: Yes. The trial court did not err in declining to award plaintiff all of her attorney fees, when she was not the prevailing party on any claim and recovered no award in her favor. However, the trial court did err in awarding plaintiff fees relating to her motion to compel appraisal of losses and continue Loss of Use benefits that, ultimately, were not covered by the policy.

III. RESPONSE TO PLAINTIFF'S STATEMENT OF FACTS AND CHALLENGES TO THE TRIAL COURT'S FACUAL FINDINGS

A. Plaintiff Fails to Demonstrate that the Trial Court's Factual Findings Are Not Supported by Evidence.

Plaintiff's arguments largely rely on her contention that this Court should ignore the trial court's findings of fact and instead rely on different facts that are more favorable to plaintiff. This Court may not reverse a trial court's findings of fact, however, unless no substantial evidence supports those findings. *In re Est. of Palmer*, 145 Wn. App. 249, 265–66

(2008) (citing *Rogers Potato Serv., LLC v. Countrywide Potato, LLC*, 152 Wn.2d 387, 391 (2004)).

The trial court's findings of fact are reviewed under a clearly erroneous standard. *State v. Atchley*, 142 Wn. App. 147, 154 (2007). "Great deference is given to the trial court's factual findings. *Id.* The party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369 (1990).

"As a general principle, an appellant's brief is insufficient if it merely contains a recitation of the facts in the light most favorable to the appellant even if it contains a sprinkling of citations to the record throughout the factual recitation." *Matter of Est. of Lint*, 135 Wn.2d 518, 531–32 (1998), *as amended* (July 9, 1998).¹ "It is incumbent on counsel

¹ Plaintiff's citations to the Clerk's Papers do not include citation to the consecutive numbered Clerk's Papers record and

to present the court with argument as to why specific findings of the trial court are not supported by the evidence and to cite to the record to support that argument.” *Id.* at 532 (citing RAP 10.3).

Strict adherence to the aforementioned rule is not merely a technical nicety. Rather, the rule recognizes that in most cases, like the instant, there is more than one version of the facts. If we were to ignore the rule requiring counsel to direct argument to specific findings of fact which are assailed and to cite to relevant parts of the record as support for that argument, we would be

are therefore difficult to follow. First American believes that plaintiff’s citation to exhibit numbers in the CP refers to plaintiff’s trial exhibits, but does not believe that all cited exhibits were submitted at trial.

Plaintiff cites to a “CP Plaintiff’s Supplemental Designation of Clerk’s Papers.” Plaintiff’s Brief, p. 28. First American has not received any “Plaintiff’s Supplemental Designation of Clerk’s Papers” and cannot identify the document to which plaintiff refers.

assuming an obligation to comb the record with a view toward constructing arguments for counsel as to what findings are to be assailed and why the evidence does not support these findings. This we will not and should not do.

Id.

As in *Lint*, plaintiff's recitation of her preferred version of the facts, even when supported by citations to the record, is insufficient to demonstrate that the trial court's actual findings of fact are not supported by substantial evidence. Plaintiff fails to demonstrate that any of the trial court's factual findings are not supported by substantial evidence.

B. The Trial Court's Finding that Mold in the Home Was Not Caused by the October 2017 Water Loss Event Is Supported by Substantial Evidence.

The trial court found that "the mold located in the Home is not attributable to the October 17, 2017 water loss event." CP 2341, ¶ 22. Plaintiff repeatedly asserts her alternative version of the facts, contending that wetted building materials from the October 2017 water loss event resulted in the growth of toxic mold in the downstairs portion of the residence.

See, e.g., Respondent/Cross-Appellant’s Brief (“Plaintiff’s Brief”), pp. 2, 4, 16, 17, 23-24.

Plaintiff fails to satisfy her burden of demonstrating that the trial court’s finding is not supported by substantial evidence. As set forth in First American’s Opening Brief and summarized below, the trial court’s conclusion that the mold in the home resulted from prior events is well-substantiated by testimony and exhibits presented at trial.

Plaintiff contends that the October 2017 water loss event caused grey water to spread “downstairs inside the walls and through the main floor ceiling,” *id.* at 1-2, and “through the upstairs floor and walls and into the main floor hallway, hallway wall and the dining/living room below,” *id.* at 15. Plaintiff contends that the October 2017 water loss event caused the inactive and active mold growth located throughout the downstairs of the home.

The trial court, however, found only that some “water flowed through the ceiling to the entryway of the Home,”

CP 2339, ¶ 8. Plaintiff cites to the testimony of her expert, Jason Kester. However, Mr. Kester did not testify that wetted building materials from the water loss event resulted in toxic mold in plaintiff's main hallway, as plaintiff contends. Plaintiff's Brief, p. 16. He did not conclude that there was mold contamination "where water from the toilet overflow went into the main floor." *Id.* at 17.

Mr. Kester specifically testified that, based on his prior inspection of the home in 2014, mold had been present in the home before plaintiff purchased the property, but he had no knowledge as to whether that prior mold have been remediated. RP 366, ln 19-368, ln 2. His 2018 report for plaintiff made no determination as to the cause of the mold that he observed. Mr. Kester specifically did not attribute the mold he found in the home in May 2018 to the October 2017 water loss event. RP 377, ln. 24-388, ln. 2.

As set forth in First American's Opening Brief, there is extensive evidence of prior water leaks in the home before any

First American policy period began.² There is also extensive evidence of mold present in the home before the beginning of any First American policy period.³

² See, e.g., RP 479; Trial Exhibit 173 (plaintiff's pre-purchase inspection finding evidence of past water leaks in downstairs bathroom and around dishwasher in the kitchen); Trial Exhibit 104, pp. 5-9; CP 407-11 (American Leak Detection's 2015 inspection and report finding evidence of prior water damage and repairs around downstairs toilet); Trial Exhibit 104, pp. 10-19; CP 412-21 (American Environmental Group's 2015 inspection finding evidence of prior water leak and water damage, as well as faulty repair to downstairs bathroom); RP 813-14; Trial Exhibit 181; Trial Exhibit 146; Trial Exhibit 182 (Crawford & Company's 2017 and 2018 inspections, finding evidence of prior water damage repair in downstairs bathroom and evidence of several prior water leaks in different areas of residence unrelated to the October 2017

water loss); Trial Exhibit 133, pp. 3-5; CP 961-66 (American Leak Detection's May 2018 report finding evidence of multiple prior leaks and water damage); Trial Exhibit 150, p. 4; CP 730. (Rimkus Consulting Group June 2018 report finding multiple areas of prior water intrusion).

³ *See, e.g.*, RP 465-67; Trial Exhibit 101, pp. 2, 7 (2014 inspection report finding mold in the first floor bathroom and walls); CP 734; RP 459; RP 471 (plaintiff's statements that she and her children started experiencing health issues caused by mold the day after they moved into the residence); RP 464; CP 734; Trial Exhibit 102 (plaintiff's statements that she learned from neighbors and a prior tenant about the past serious mold problem at the residence); RP 482; Trial Exhibit 104, p. 1 (plaintiff's claim to First American for mold damage in downstairs bathroom in 2015); RP 478-82; Trial Exhibit 174 (Mold Investigations, LLC's July 2015 report finding past moisture intrusion and presence of mold); Trial Exhibit 150,

The trial court's finding that "the mold located in the Home is not attributable to the October 17, 2017 water loss event" CP 2341, ¶22, is well-supported by substantial evidence and, thus, not reversible. Plaintiff fails to demonstrate that the trial court's conclusion is not supported by substantial evidence. All of plaintiff's arguments and issues on appeal that would require this Court to reverse or ignore the trial court's factual finding to that effect fail as a matter of law.

C. Other Facts Asserted by Plaintiff Are Not Supported by the Trial Court's Findings, the Record, or Logic.

p. 5; CP 731 (Rimkus Consulting Report finding presence of active and/or historical fungal growth caused by prior water leak and intrusion, not by the October 2017 water loss event); RP 493-94; Trial Exhibit 105; RP 816-17 (evidence that Belfor USA Group, Inc. did not remove its remediation/drying equipment until testing confirmed impacted areas were dry).

Plaintiff makes numerous additional factual assertions that contradict the trial court's findings. This Court may not disregard the trial court's findings when they are supported by substantial evidence. Many of plaintiff's factual assertions are simply not supported by the testimony and evidence presented at trial. Many of plaintiff's factual assertions rely on illogical inferences not based in reality or rationality.

1. First American's "Admissions"

Plaintiff suggests that the independent adjuster, Josh Peters, of Crawford & Company, determined that the cause of all damage claimed by plaintiff was the toilet overflow. Plaintiff's Brief, pp. 1-2; 15-16. Similarly, plaintiff asserts that First American stated or admitted that the cause of loss was a water leak in the bathroom. *Id.* at 16.

This is correct as it pertains to the October 2017 water loss event. There is no dispute that there was a water loss event in October 2017 that caused damage to the plaintiff's property. First American accepted coverage for that loss and fully

compensated plaintiff for damage caused by that event. Those facts do not prove or even suggest that prior damage to the property (including mold) claimed by plaintiff was caused by the October 2017 water loss event, however. Substantial evidence establishes that mold and prior damage in the home was present and caused by prior events before October 2017.

Likewise, First American’s “admission” that appraisal determines the amount of the covered loss, *id.* at 7-8, 21-22, does not prove or suggest that the appraisal process transmutes non-covered losses into covered losses. An insured is entitled to compensation only for covered losses, whether or not they invoke the appraisal provisions of the policy. First American has never admitted that plaintiff is entitled to compensation for damages not caused by the October 2017 water loss event. First American has consistently objected that prior damages claimed by plaintiffs are not covered by Policy. *See, e.g.*, CP 157-58 (First American’s Response to Plaintiff’s Motion to Compel Appraisal, raising coverage and causation objections); CP 2761,

¶1 (trial court’s finding that First American “did not submit the matter to appraisal because Plaintiff and First American did not agree the cause of the alleged damages to Plaintiff’s home was a result of the October 17, 2017 water loss event.”

Similarly, plaintiff contends that the trial court ignored “admissions” by First American that plaintiff’s claim involves only the October 2017 water loss event. Plaintiff’s Brief, p. 24. This is not an “admission”; it is the crux of First American’s position. Only losses caused by the covered 2017 water loss event are compensable under plaintiff’s claim and in this action. Losses that resulted from prior water leaks or intrusion are not covered under the claim and are not compensable in this suit. As the trial court concluded, First American more than compensated plaintiff for all losses caused by the October 2017 water loss event.

2. Loss of Use/Additional Living Expense

Plaintiff’s assertions regarding Loss of Use/Additional Living Expense (“ALE”) coverage are incomplete and

unsupported. There is no dispute that First American paid for plaintiff's Loss of Use expenses until ordered by the Court that it could stop.⁴ Plaintiff also fails to provide the Court with a copy of documents she cites in her brief.⁵

Contrary to plaintiff's contention, Plaintiff's Brief, p. 19, Judge Veljacic did not order First American to continue paying for a rental home "until the house was repaired." Judge Veljacic's

⁴ See CP 2761, ¶2 (trial court's finding that plaintiff had continually received Additional Living Expense from First American during the pendency of the case); CP 2343, ¶6 (ruling that First American could stop paying plaintiff's Loss of Use or Additional Living Expenses); CP 2808, ¶¶4, 5 (ruling that plaintiff had not established that First American discontinued ALE in violation of any court order).

⁵ See Plaintiff's Brief, pp. 5, 19 (citing to an "Exhibit 18," but failing to provide a copy to this Court). First American has not been able to verify that this exhibit was admitted at trial.

June 2019 Order simply rules that First American “is obligated to pay Loss of Use benefits.” CP 330. The trial court found that the June 2019 order required First American to pay Loss of Use/Additional Living Expense “during the pendency of the case,” CP 2807, ¶ 2, which First American did.

First American objected to continuing to pay for the Loss of Use expenses related to mold caused by prior damage, after First American determined that the mold was not caused by the covered water loss event. However, First American continued paying those expenses when ordered to do so by the court.

First American was subsequently vindicated when the trial court found that the ongoing, mold-related Loss of Use expenses were not caused by the covered October 2017 water loss event. First American thus paid around \$150,000 for Loss of Use benefits, the great majority of which did not result from the covered loss. *See* Plaintiff’s Brief, p. 9, (stating that First American paid around \$150,000 in ALE benefits before trial). Despite prevailing on an intermediary motion for partial

summary judgment (which required First American to continue paying Loss of Use expenses while the dispute was resolved), plaintiff ultimately failed to establish at trial that the Policy covered those expenses. Plaintiff was not, in the end, the prevailing party on her Loss of Use/ALE claim.

3. Damage to Personal Property/Contents

Plaintiff incorrectly asserts that First American refused to pay for any personal property (“contents”) damaged as a result of the water loss event. *Id.* at p. 2. First American paid for Paul Davis Restoration to pack up and store plaintiff’s personal property in April 2018.⁶ The “Water Damage Appraisal Award,” which First American (more than) paid, specifically included \$3,734.50 for contents losses caused by the water loss event.⁷

⁶ CP 2340, ¶16; RP 522-23.

⁷ Plaintiff’s Trial Exhibit 10, p. 3.

The Court ruled that First American paid to replace any contents damaged by the water loss event. CP 2343, ¶ 5.

Substantial evidence supports that finding.

4. The Appraisers and Prior Judge Did Not Decide that All Damages Claimed By Plaintiff Were Caused by the Covered Water Loss Event.

Plaintiff's suggestion that the appraisers involved in the appraisal process, and Judge Veljacic, all agreed that both the Water Damage Appraisal Award and Mold Damage Appraisal Award reflected losses covered by the policy, *see* Plaintiff's Brief, pp. 6, 20-21, is expressly contradicted by the record. As discussed in First American's Opening Brief, Mr. Blagg and Roger Howson (the appraiser chosen by First American) disagreed as to the form of the appraisal award, given the parties' dispute as to what damages were caused by the October 2017 water loss event as opposed to prior leaks and water intrusions. Judge Bennett ultimately agreed with Mr. Howson's approach

to the form of the appraisal⁸ and made it clear that the appraisal did not decide any disputed issues of causation or coverage.⁹

In confirming the appraisal award, Judge Veljacic specifically recognized—and did not rule on—the ongoing coverage dispute. Judge Veljacic stated that “I will not speak as to the legal effect of this confirmation. I understand that to be in dispute. ... I don’t know that I’m required to speak to the legal

⁸ See Trial Exhibit 163 (email from Judge Bennett); CP 704 (Declaration of Roger Howson, ¶13); CP 786.

⁹ See Trial Exhibit 163; CP 786 (stating that determining which damage was caused by which water events was “the type of factual dispute that is not within the task assigned to the appraisers”); Trial Exhibit 10; CP 333 (“Mold Appraisal Award” and “Water Dama[g]e Appraisal Award” stated that the appraisal “does not address policy coverage, policy limits, prior payments by Insurer, and all terms and conditions of the insurance policy remain in force.”).

effect of that at this point.” RP 78, lns 16-18. Judge Veljacic subsequently denied plaintiff’s motion for partial summary judgment, which sought a ruling that First American had breached the insurance contract by not paying the “Mold Damage Award” appraisal calculation within 30 days of its filing.¹⁰

First American has consistently disputed the scope of coverage, in light of the prior water and mold damage in the home. Plaintiff made a claim for mold damage in 2015; First American denied that claim, in part because any loss that caused the water damage and mold damage present in the home in 2015 predated the First American Policy. CP 2338-39, ¶ 7; CP 403-06; Trial Exhibit 104.

¹⁰ See CP 363-79 (Plaintiff’s Motion for Partial Summary Judgment); CP 1156-57 (Order denying partial summary judgment).

Plaintiff's attempt to deny the existence of the coverage/causation dispute cannot be reconciled with the record or the actual terms of the appraisal awards or court's rulings.

5. Other Irrelevant Factual Assertions

Plaintiff also asserts various facts that are not relevant to any issues raised in the appeal, such as plaintiff's appraiser's (Adam Blagg's) methodology for preparing an appraisal estimate. Plaintiff contends that the trial court "criticized Blagg for having submitted an estimate that was higher than the final awards." Plaintiff's Brief, p. 20 n.8. In fact, the trial court criticized Mr. Blagg because "Blagg should have known through his inspection of the Home and its contents that his appraisal included damages to the Home and contents that were not attributable to the water loss event." CP 2341, ¶26.

Likewise, plaintiff asserts irrelevant facts regarding the reasons Belfor USA refused to continue working with plaintiff. Plaintiff's Brief, p. 16. The trial court specifically found that the "failure of Belfor to repair the home and any delay in hiring

another contractor is not attributable to any actions of First American.” CP 2340, ¶15. Plaintiff has made no showing that this finding is not supported by substantial evidence.

6. The Facts Presented at Trial Establish Misrepresentation by Plaintiff.

Finally, regarding the facts relating to First American’s misrepresentation counterclaim, plaintiff again asks the Court to discard the trial court’s factual findings and substitute facts more favorable to plaintiff. To the extent plaintiff’s challenges are based on credibility determinations made by the trial court, “[c]redibility determinations cannot be reviewed on appeal, as credibility determinations are solely for the trier of fact. *Morse v. Antonellis*, 149 Wn.2d 572, 574 (2003); *Matter of Est. of L’Amarca*, 11 Wn.App.2d 1072 (2020).

Plaintiff attempts to twist statements made by the Guardian Ad Litem (“GAL”) in plaintiff’s lawsuit against the former owner of the house (“the *Yang* lawsuit”) to “prove” facts in this case. *See* Plaintiff’s Brief, pp. 26-28. The GAL’s report,

however, is clear that the GAL did not review any documents related to the *Montler v. First American* lawsuit, did not review the Kester Report, and does not rely on any mold investigations after 2015. *See* Plaintiff's Trial Exhibit 15. The GAL's statement quoted by plaintiff is merely an acknowledgement of the limited scope of his report, not a substantive finding relating to a wholly separate lawsuit.

Plaintiff admits that she and her counsel told First American and the Court that the damages claimed in this matter were different than the damages claimed in the *Yang* lawsuit. *See* Plaintiff's Brief, p. 28. As set forth in First American's Opening Brief, plaintiff and her counsel did so repeatedly.¹¹

The trial court specifically found that plaintiff knew or should have known that Mr. Blagg's appraisal included damages potentially attributable to water damage that pre-dated

¹¹ *See, e.g.*, RP 583; CP 310; RP 19; RP 26; RP 27; CP 1701-04; CP 436; CP 508; RP 119.

plaintiff's purchase of the residence. CP 2342, ¶31. The trial court also found that plaintiff knew that Mr. Blagg's estimate and the Kester Report were used to leverage potential settlement in her lawsuit against the former owner of the residence. CP 2341, ¶¶ 29, 30.¹²

Plaintiff used the same Kester report and the same damage repair estimate by Mr. Blagg to support her claims for damages in both the *Yang* lawsuit and in her insurance claim to First American. Plaintiff's disagreement with the trial court's interpretation of her settlement communications with the former owner does not qualify as a lack of substantial evidence to support the trial court's findings.

¹² See Trial Exhibit 172 (plaintiff's settlement demand letter in *Yang* lawsuit, with Mr. Blagg's estimate and Kester report attached, threatening that plaintiff would seek her repair costs, hotel expenses, and reimbursement for contaminated property from the *Yang* defendants, if they did not settle).

Throughout her statement of facts, plaintiff presents an alternative version of facts not supported by the evidentiary record, rejected by the trial court, or both. Plaintiff fails to demonstrate that any of the trial court's factual findings are not supported by substantial evidence. Plaintiff's argument largely depends upon her assertion that this Court should find different facts than the trial court. When—as in this matter—the trial court's findings are supported by substantial evidence, this Court cannot substitute its impressions and weighing of the evidence for the trial courts. Even if the Court were to do so, in this matter, the great weight of evidence supports the trial court's findings. Plaintiff's arguments that would require the Court to reverse the trial court's findings of fact fail as a matter of Washington law.

IV. RESPONSE TO CROSS APPEAL

A. Causation and Coverage Were in Dispute.

Plaintiff makes the frankly incomprehensible assertion that “[n]either causation nor coverage were in dispute” in this

matter. Plaintiff’s Brief, pp. 33 (capitalization removed). This argument is repeated throughout plaintiff’s brief and imbues many of her arguments. *See, e.g., id.* at 32, 45-46. First American’s filings and pleadings made in this matter are premised on a causation/coverage dispute—the parties’ disagreement as to whether prior/mold-related damages at the residence were caused by the accepted and covered October 2017 water loss event.

First American has consistently disputed the scope of coverage and causation, in light of the prior water damage and mold in the home. Plaintiff’s attempt to deny that dispute cannot be reconciled with the record or the actual terms of the appraisal awards.

Plaintiff’s assertion that First American has “never raised the [*sic*] any causation or coverage issues in a motion to dismiss,” *see id.* at 34, is not an admission that all damages claimed by plaintiff are covered by the policy. Given that evidence outside the face of the pleadings would be necessary

to show that the prior damages were not covered by the policy, a motion to dismiss would be inappropriate. First American consistently asserted that damages claimed by plaintiff were not covered by the Policy because they were caused by the covered cause of loss.¹³

Likewise, the fact that First American paid for the undisputed, covered portion of the loss and for plaintiff's Loss of Use benefits (as ordered by the Court) does not qualify as an "admission by conduct" that all portions of the claims damages are covered, as plaintiff asserts. *See* Plaintiff's Brief, p. 34. First American has always "admitted" that there was a covered loss that caused some damage to plaintiff's insured residence. First

¹³ *See, e.g.*, CP 151-62 (First American's Opposition to Motion to Compel Appraisal); CP 348-56 (First American's Opposition to Motion to Confirm Appraisal Awards); CP 788-807 (First American's Opposition to Plaintiff's Motions for Partial Summary Judgment and Cross Motions).

American has fully compensated plaintiff for that covered loss. Those “admissions” do not erase or obviate First American’s objections to paying for damages that did not arise out of the covered cause of loss.

An insurer may accept coverage for a loss and resulting damage without accepting coverage for damages caused by other, prior events. Contrary to plaintiff’s suggestions throughout her brief, an insurer may contend—as First American did in this matter—that certain claimed damages were not caused by the covered loss event without denying coverage for the entire loss event.

The coverage dispute in this matter concerns which alleged damages were covered under the accepted claim, or which were caused by prior, non-covered causes. The fact that the Policy was an “open perils” policy does not mean that any defects or damage existing at the home is covered, even if that damage resulted from causes that began before the Policy period began. Plaintiff’s claim is still subject to all policy terms,

exclusions, and limitations, including the requirement that the alleged damage result from a covered cause of loss. Plaintiff's arguments regarding coverage for the October 2017 water loss event, *see id.* at pp. 47-48, are irrelevant to the actual issues disputed and decided by the trial court.

Plaintiff argues that First American, somehow, admitted that there was coverage for all claimed damages because First American did not deny coverage based on any policy exclusions. *See id.* at p. 48. In this matter, the mold-related damages were not covered by the Policy because they resulted from causes of loss that occurred before First American insured the property. First American denied plaintiff's claim for mold damage at the property in 2015, because the damage was caused by events that predated the Policy period. Plaintiff has the initial burden to demonstrate that a loss is covered by the policy. *See McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 731 (1992) (stating that, in determining coverage, the "insured must show the loss falls within the scope

of the policy's insured losses.'"). Plaintiff failed to do so in this matter, just as in 2015.

There is no dispute that First American accepted coverage for the October 2017 toilet overflow event. Plaintiff's attempt to "roll up" damages caused by other events into the coverage provided for the covered loss should be rejected.

B. Plaintiff's First Three Assignments of Error Fail as a Matter of Law, Because the Trial Court's Findings Are Supported by Substantial Evidence.

Plaintiff combines her argument on her first four assignments of error. The first three assignments of error all involve plaintiff's request that the Court find different facts than the trial court and thus can be addressed together. As discussed above, the Court may not reverse the trial court's findings of fact unless no substantial evidence supports the trial court's findings. *In re Est. of Palmer*, 145 Wn. App. at 265–66 (citing *Rogers Potato Serv.*, 152 Wn.2d at 391).

First American's Opening Brief and its Response to Plaintiff's Statement of Facts, above, all demonstrate that substantial evidence supports the trial court's finding that

- (1) alleged prior/mold-related damages were not caused by the covered water loss event;
- (2) the appraisal panel did not conclude and agree that all of the damages estimated in both the Water Damage Loss Appraisal Award and Mold Damage Appraisal Award were caused by the October 2017 water loss event. To the extent Mr. Blagg made any such conclusion, the majority of the appraisal panel did not join that conclusion; and
- (3) Jason Kester not make a conclusion as to causation for the mold and water damage to the Home or its contents in his expert report.

All of these findings are supported by substantial evidence, as discussed in the Opening Brief and above. First American incorporates its prior discussion of the substantial evidence supporting those findings into this Response.

1. Substantial Evidence Supports the Finding that the Prior/Mold Damaged Claimed by Plaintiff Was Not Caused by the October 2017 Event.

As discussed in the Opening Brief and above, there was extensive evidence submitted at trial of water leaks and intrusion in the home prior to October 2017. There was also extensive evidence of mold present in the home prior to October 2017. There was no evidence presented that the mold had been remediated prior to October 2017. There was evidence that moisture resulting from the October 2017 water leak had been completely dried and remediated by Belfor immediately after the event.

Plaintiff argues that Mr. Blagg testified he had concluded water from the upstairs overflow ran down to the first level and caused mold on the first level several months later. *See* Plaintiff's Brief, pp. 35-39. A trial court may conclude, however, that some evidence is more persuasive than other evidence. In fact, a finder of fact will almost always need to weigh the evidence and make credibility determinations.

“Credibility determinations are peculiarly matters for the trier of fact and may not be second-guessed by an appellate court.” *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 464 (2010). Pointing out some contrary testimony does not establish a lack of substantial evidence supporting a trial court’s finding. This Court may not second-guess the trial court’s weighing of competing evidence.

Plaintiff’s argument that mold discovered on the first floor of the home in April 2018—in locations of prior water leaks and intrusions and prior mold findings—was caused by the October 2017 water loss is not supported by the evidence. The trial court’s conclusion that the prior/mold damage claimed by plaintiff was not caused by the October 2017 water loss event is supported by substantial evidence. Therefore, plaintiff’s first assignment of error fails as a matter of law.

2. Substantial Evidence Supports the Finding that the Appraisal Panel Did Not Make Any Causation Conclusions.

Plaintiff's second assignment of error, Plaintiff's Brief, p. 11, concerns the trial court's ruling that, as an appraiser, Mr. Blagg did not make a conclusion as to the causation for the mold and water damage to the Home or its contents." *See* CP 2341, ¶26. Although plaintiff presents little argument on this assignment of error, it appears she again contends that the appraisers "admitted" that all damages claimed by plaintiff were covered, because they refer to the October 2017 claim in their awards.

Evidence presented at trial showed that Judge Bennett wanted the appraisal award to be clear that it did not make any conclusions regarding the causation and coverage dispute between the parties. *See* Trial Exhibit 163; CP 786 (email from Judge Bennett stating that determining which damage was caused by which water events was "the type of factual dispute that is not within the task assigned to the appraisers"). "My belief is that we are presented with a damaged house, and the court and parties need to know how much it will cost to fix it.

Then, if they choose to do so, they get to fight about how much of that cost is attributable to different events,” Judge Bennet continued. *Id.*

To make it clear that no causation issues were decided, the appraisal panel bifurcated its award into two parts—the portion for which causation was not disputed (the “Water Dama[g]e Appraisal Award”) and the portion for which causation was disputed (the “Mold Appraisal Award”). *See* Trial Exhibit 10; CP 333. Both awards state that the appraisal “does not address policy coverage, policy limits, prior payments by Insurer, and all terms and conditions of the insurance policy remain in force.” Trial Exhibit 10; CP 333.

Given this evidence, the trial court’s conclusion that the appraisal panel did not decide any causation or coverage issues is supported by substantial evidence.

3. The Trial’s Court’s Finding that Mr. Kester Did Not Address Causation of the Mold He Found in the Home Is Supported by Substantial Evidence.

As discussed above, Mr. Kester's testimony and report did not make any conclusion that the October 2017 water loss event caused any mold in the residence. Plaintiff's characterization of Mr. Kester's testimony, *see* Plaintiff's Brief, pp. 39-44, does not reflect the actual words used by Mr. Kester in his testimony at trial. For example, Mr. Kester's testimony that mold growth requires actively wet material makes no conclusions as to whether the October 2017 event was the cause of that moisture. In fact, Mr. Kester testified that he found no elevated moisture in the building components of the home during his inspection. RP 365, ln 4 – 366, ln 15.

Although he testified that he agreed with Mr. Blagg, during the inspection, as to how water might have moved through the walls and floors, Mr. Kester specifically clarified that his report did not attribute the mold he found in the home in May 2018 to the October 2017 water loss event. RP 377, ln. 24-388, ln. 2. To the extent Mr. Kester's testimony was unclear or contradictory, the trial court was tasked with

considering all of his testimony and reports and determining which portions are credible.

This Court may not disturb the trial court's credibility evaluations. Substantial evidence supports the trial court's finding that Mr. Kester did not make any conclusion regarding the cause of any mold located in the home.

4. Plaintiff's Irrelevant and Inaccurate Arguments and Assertions Should be Given No Weight.

Once again, plaintiff's argument includes numerous assertions that are irrelevant or incorrect. For example, plaintiff refers to various general principles of insurance law regarding the duty of good faith. Plaintiff's Brief, pp. 30-31. However, she fails to show how those principles apply to any issues in this matter and fails to demonstrate any violation of those duties by First American.

Plaintiff contends that First American has never valued the cost of restoring the residence to its condition before October 2017. *Id.* at 32. To the extent that argument is

preserved, it is incorrect. The Water Damage Appraisal Award does represent the cost of restoring the insured residence to its condition prior to October 2017. First American calculated and paid benefits to plaintiff that exceeded the amount of the Water Damage Appraisal Award.

Plaintiff also contends that First American never valued plaintiff's contents claim. *Id.* As discussed above, this is inaccurate. First American did value the contents claim and, according to the trial court paid it in full before appraisal. CP 2342, ¶35; CP 2343-44, ¶¶5, 7. As the trial court concluded, First American satisfied its duties to plaintiff under Washington's applicable statutes and regulations.

C. Plaintiff's Fourth Assignment of Error Fails as a Matter of Law, Because the "Efficient Proximate Cause" Rule Does not Apply.

Under Washington law,

“where a peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and final loss, produce the result for which recovery is sought, the insured peril is regarded as the

‘proximate cause’ of the entire loss,’ even though other events within the chain of causation are excluded from coverage.”

Wright v. Safeco Ins. Co. of Am., 124 Wash. App. 263, 273–74 (2004). This “efficient proximate cause” rule means that, if a covered loss event results in other loss events, all ensuing damage is covered by the policy, even if some of the later loss events would otherwise be excluded from coverage.

That is not the circumstances of this matter, however. First American contended (and the trial court agreed) that prior water leaks and intrusions caused the mold in plaintiff’s residence. The October 2017 water loss event plainly did not and could not have “set into motion” the prior water leaks and intrusions that predated the October 2017 water loss event.

The rule applies when a covered loss “set[s] into motion a chain of events” that includes an excepted risk. *Krempel v. Unigard Sec. Ins. Co.*, 69 Wn.App. 703, 705–06 (1993). The rule does not warp the space-time continuum and result in coverage for damages resulting from causes of loss that

occurred years before the covered loss, however. An event in October 2017 did not and could not have set into motion events that occurred before October 2017. None of the case law cited by plaintiff suggests that the efficient proximate cause rule would apply under the circumstances of this matter.

Because the rule does not apply, plaintiff's fourth assignment of errors fails as a matter of law.

D. Plaintiff's Fifth, Sixth, and Seventh Assignments of Error Fail as a Matter of Law, Because the Appraisal Process Did Not Decide Disputed Coverage Issues.

Plaintiff combines argument on her fifth, sixth, and seventh assignments of error. These assignments of error all concern the effect and implications of the appraisal process and appraisal award, in the face of the causation/coverage dispute between the parties.

These issues and arguments largely overlap with those presented in First American's first assignment of error in its Opening Brief and some of plaintiff's arguments on her first three assignment of error, addressed above. First American's

arguments on its first assignment of error and plaintiff's first three assignments of error should be considered incorporated into this response.

1. Appraisal Is Premature When There Is a Causation/Coverage Dispute.

Plaintiff asserts that, under Washington law, appraisal awards "are conclusive and binding." *See* Plaintiff's Brief, p. 48. In *Bainter v. United Pac. Ins. Co.*, 50 Wn.App. 242 (1988), cited by plaintiff, the court ruled that an appraisal award is not conclusive if a party can produce any evidence of prejudice or bias, which must be submitted to a jury. Plaintiff cites *Goldstein v. National Fire Ins. Co.*, 106 W. 346 (1919) for the principle that a court may deny enforcement of an appraisal award in other circumstances, as well, such as cases of fraud or mistake.¹⁴ Contrary to plaintiff's argument, the authorities cited

¹⁴ *See also* Plaintiff's Brief, p. 55 (citing additional authorities).

by plaintiff demonstrate that appraisal awards are not sacrosanct.

Under the terms of the policy, the appraisal process is intended to determine only the “amount of loss,” not the scope of loss or liability. *See* CP 208; Trial Exhibit 6 (policy appraisal provision). Issues of liability, coverage, and causations are issues for the court—not the appraisal panel—to decide under Washington law and under the persuasive law of other jurisdictions. *See, e.g., Keesling v. W. Fire Ins. Co. of Fort Scott, Kansas*, 10 Wn. App. 841, 845 (1974) (explaining that authority and control over the ultimate disposition of a matter remains with the courts); *Church Mut. Ins. Co. v. Circle of Light*, 416 F. Supp. 3d 847, 851 (E.D. Mo. 2019) (“Appraisal awards are inapplicable when the disputed issue pertains to scope of coverage as opposed to the value of the covered damage.”); *Wells v. American States Preferred Ins. Co.*, 919 S.W.2d 679, 684–85 (Tex.App.1996) (“[A]ppraisers have no power to determine the cause of the damage[]. Their power is

limited to the function of determining the money value of the property damage.”); *Rogers v. State Farm Fire & Cas. Co.*, 984 So.2d 382, 392 (A. 2007) (“Questions of coverage and liability should be decided only by the courts, not appraisers.”).

Plaintiff cites authorities ruling that courts should generally enforce appraisal agreements once they have determined the value of covered damages. None of these cases involve a dispute as to whether a particular category of alleged damages are covered by an insurance policy, however. *See, e.g., Goldstein*, 106 Wn. at 349 (insurer demanded appraisal); *Keesling*, 10 Wn. App. at 844-45 (dispute as to whether the insureds had waived the appraisal provision, not scope of coverage or liability); *Hyland v. Millers Nat. Ins. Co.*, 91 F.2d 735, 742-43 (9th Cir. 1937) (appraisal award voided due to fraud by the insured); *Portland Gen. Elec. Co. v. U.S. Bank Tr. Nat. Ass'n as Tr. for Tr. No. 1*, 218 F.3d 1085, 1086 (9th Cir. 2000) (concerning a commercial contract pursuant to which the

parties agreed to appraisal of turbine generators, not an insurance policy).

Munn v. Nat'l Fire Ins. Co. of Hartford, 237 Miss. 641, 644, 115 So. 2d 54 (1959), though cited by plaintiff, Plaintiff's Brief, p. 55, supports First American's position. In *Munn*, the court considered "the extent of the powers of appraisers under a windstorm insurance policy. Is that power limited to an ascertainment of the damage to the property or does it include the power on behalf of the appraisers to determine the cause of the damage to the property?" The court ruled that "the appraisers have no power to determine the cause of the damage. Their power is limited to the function of determining the money value of the property which may be damaged by the storm." *Id.*

First American's Opening Brief cites numerous authorities for the principle that appraisers and appraisal awards cannot and should not be used to determine coverage or causation issues. Plaintiff does not address or dispute any of those authorities in her brief. The fact that an appraisal

provision is valid and efficient in some cases does not mean that appraisal is appropriate at all times. Where there is a dispute as to whether certain damages are even covered under an insurance claim, appraisal of the disputed damages is not appropriate. *See, e.g., Rogers*, 984 So.2d at 392 (ruling that the trial court erred in ordering the parties to submit to appraisal when there was a disagreement as to the causation of damage to a roof); *Mercer Int'l, Inc. v. U.S. Fid. & Guar. Co.*, 938 F. Supp. 680, 683 (W.D. Wash. 1996) (denying a motion to compel appraisal and stating that “an appraisal now would be useless” in light of a coverage dispute).

The trial court erred in ordering the parties to submit to appraisal before the scope of covered damages was established, resulting in a waste of time and effort for the appraisers, the parties, and the court. The trial court—after hearing all the evidence at trial—correctly ruled that First American’s objections to appraisal were not an attempt to delay or avoid

paying covered damages, but were instead a legitimate dispute regarding causation and coverage.¹⁵

2. Coverage and Causation Disputes Were Not Resolved through the Appraisal Process.

As discussed above, Judge Veljacic, did not rule that there were no coverage issues. He reserved those issues for another day, then subsequently denied plaintiff's motions for partial summary judgment. Likewise, the majority of the appraisal panel agreed that the mold damage award should be separated from the water damage award, given the causation dispute. The panel made it clear in the appraisal awards themselves that no coverage or causation issues were decided.¹⁶

¹⁵ The trial court did err in ruling that First American breached the Policy, regardless of the reasons for its objections to appraisal, for the reasons set forth in First American's Opening Brief.

¹⁶ Trial Exhibit 10; CP 333.

Judge Bennett's correspondence with the other appraisers confirms his intent to avoid deciding in coverage, causation, or liability issues, as discussed above.¹⁷

Judge Sheldrick did not "refuse to respect" any prior decisions by Judge Veljacic, as plaintiff repeatedly contends. As the trial judge in the bench trial, Judge Sheldrick was the first and only judge to hear all the evidence regarding the potential causes of the prior mold damage at the insured residence. It was her job to hear the evidence and resolve the coverage dispute, which she did. Her findings are well-supported by substantial and persuasive evidence. Plaintiff's unhappiness with those rulings does not justify plaintiff's "refusal to respect" Judge Sheldrick's experience and judgment, as she does by making personal attacks on Judge Sheldrick throughout her briefing.

3. First American Did Not Breach the Insurance Contract or its other Duties.

¹⁷ Trial Exhibit 163; CP 786.

As the trial court found in its Amended Findings of Fact, Conclusions of Law and Judgment, First American “did not submit this matter to appraisal because Plaintiff and First American did not agree the cause of the alleged damages to Plaintiff’s home was a result of the October 17, 2017 water loss event.” CP 2761, ¶1. First American did not breach the insurance contract, because it promptly investigated the claim and paid plaintiff for all damages covered by the Policy resulting from the water loss event. CP 2343, ¶¶3-6.

Judge Veljacic’s prior ruling requiring First American to submit the claim to appraisal, despite the ongoing coverage dispute, was premature. When plaintiff moved to compel appraisal, plaintiff had already sent a settlement demand in the *Yang* lawsuit asserting that the *Yang* defendants were liable for the same repair costs plaintiff was alleging in this matter, using the same Kester Report and Blagg estimate as she used in this matter. Trial Exhibit 172; CP 1812. Despite this, plaintiff and

her counsel assured the Court that the *Yang* lawsuit was unrelated and did not overlap with this matter. *See* CP 310; RP 10-31. Because plaintiff had improperly withheld her correspondence in the *Yang* lawsuit from production, neither First American nor Judge Veljacic knew about those misrepresentations and inconsistencies, at that time.

Given the trial court's ruling that First American had already paid plaintiff all amounts required under the policy, before the appraisal, First American did not breach the policy by objecting to appraisal. The trial court's rulings were based on all the evidence presented at trial, not just plaintiff's (false) assertions that were before Judge Veljacic when he ordered appraisal.

Plaintiff may not rely on a preliminary ruling in this case to establish breach of contract at trial. The trial judge ultimately heard the evidence and ruled on the coverage issues that Judge Veljacic had previously declined to rule on. The trial court's

findings of facts, made after trial, demonstrate that the prior, preliminary ruling was not correct.

Plaintiff argues that First American breached its duty of good faith by objecting to paying for an appraisal award that the trial court ruled was not covered by the policy. Plaintiff's Brief, p. 59. Likewise, plaintiff contends that First American violated Washington's insurance code by requiring plaintiff to initiate litigation to pursue coverage for and appraisal of losses that were not covered by the policy.

Plaintiff did not prevail on these claims for coverage. It is irrelevant that, earlier in the case, before the evidence was developed and heard by the court, a different judge previously assigned to the case made preliminary rulings that were favorable to plaintiff. The trial judge had authority to make both factual findings and legal rulings based on those findings, even if they differed from earlier, preliminary rulings.

Preliminary rulings in a case do not make plaintiff the prevailing party on her eventually-unsuccessful contract,

statutory, or regulatory claims. The trial courts' factual findings are supported by substantial evidence. The trial court's ruling that First American was not "dilatory" is supported by substantial evidence. In fact, that conclusion is required in light of the ruling that First American had paid plaintiff all she was entitled to receive, before appraisal was even ordered. First American cannot be held liable for delaying payments that were never required under the Policy, in the first instance.

E. Plaintiff Is Not Entitled to Attorney Fees.

1. Plaintiff Is Not Entitled to Attorney Fees Under IFCA.

The trial court ruled that plaintiff failed to establish her claim for violation of the Insurance Fair Conduct Act or its regulations. CP 2342, ¶1. Plaintiff argues that the preliminary ruling requiring appraisal and continuation of Loss of Use/ALE benefits during the dispute establishes First American's liability, despite the fact that plaintiff ultimately did not prevail

on her IFCA claim. To the contrary, there is no “mandatory effect” of intermediary rulings, as plaintiff argues. *See* Plaintiff’s Brief, p. 63.

The trial court ruled that First American did not violate IFCA, after hearing the evidence at trial. Plaintiff argues that Judge Veljacic’s statement that First American was dilatory by objecting to appraisal “is essentially a finding that FA violated” the IFCA. *Id.* Judge Veljacic did not actually make any ruling that First American violated the IFCA, however.

After the court ordered appraisal and confirmed the appraisal awards, plaintiff moved for partial summary judgment, seeking a ruling that First American had breached the Policy and violated IFCA. CP 363, 370-73. Judge Veljacic denied that motion for partial summary judgment. CP 1156-57.

Plainly, Judge Veljacic did not believe his earlier rulings established a violation of IFCA, or he would have granted plaintiff’s motion. Comments made by Judge Veljacic, in the

context of requiring appraisal, do not establish any IFCA violations on the party of First American.

IFCA requires that an insured be able to prove that her insurance claim was “unreasonably denied.” RCW 48.30.015(1). The trial court’s finding that First American paid to plaintiff all amounts that plaintiff was entitled to receive under the Policy, before appraisal, precludes any finding of an IFCA violation. The trial court ruled that First American did not violate IFCA. Plaintiff has provided no basis for this Court to reverse the trial court’s ruling.

Plaintiff is not entitled to attorney fees under IFCA because plaintiff did not prevail on her IFCA claim. She was not the “prevailing party before trial even started,” as she contends. Plaintiff’s Brief, p. 64. That is not how trials work. Plaintiff’s attempt to avoid the actual post-trial orders and judgment entered in this matter is misguided and ineffectual. The trial court correctly declined to award attorney fees pursuant to IFCA.

2. Plaintiff Is Not Entitled to Attorney Fees Under *Olympic Steamship*.

First American's Opening Brief argues that the trial court erred in awarding plaintiff \$18,771 in attorney fees for bring the Motion to Compel Appraisal and Motion for Partial Summary Judgment decided in June 2019. Plaintiff argues that she is entitled to all of her attorney fees, not just a portion of those fees, pursuant to *Olympic Steamship v Centennial Ins. Co.*, 117Wn. 2d 37, 53 (1991) and its progeny. Plaintiff is not the prevailing party and is not entitled to any attorney fees under *Olympic Steamship*.

In *Ellis Ct. Apartments v. State Farm Fire & Cas. Co.*, 117 Wn. App. 807, 809 (2003), cited by plaintiff, Plaintiff's Brief, p. 66, the insured won on its insurance policy claims against the insurer. That did not occur in this matter. Plaintiff was not compelled to assume the burden of legal action to receive benefits to which she was entitled, in this matter—the justification for an award of fees under *Olympic Steamship*.

According to the trial court's rulings, First American had already paid plaintiff all the insurance policy benefits that she was entitled to receive before the court ordered appraisal. Plaintiff did not prevail on her argument that she was entitled to recover more. The court's ruling that First American must continue paying Loss of Use/ALE benefits while the matter proceeded and submit the valuation issues to appraisal did not make plaintiff the prevailing party on any claim.

Prevailing on an intermediary motion does not entitle an insured to an award of attorney fees under *Olympic Steamship*. Plaintiff received no affirmative judgment in her favor, on any claim. A claimant who is not the prevailing party in an action against an insurer is not entitled to attorney fees. *United Servs. Auto. Ass'n v. Speed*, 179 Wn.App. 184, 204 (2014); *Humleker v. Gallagher Bassett Servs. Inc.*, 159 Wn.App. 667, 686 (2011).

The trial court ruled that plaintiff was not the prevailing party in this lawsuit. CP 2762, ¶8. There is no

basis for an award of attorney fees to plaintiff under *Olympic Steamship* or any other theory.

V. REPLY ARGUMENT

A. Plaintiff Fails to Demonstrate Any Breach of Contract on Behalf of First American.

First American assigned error to the trial court's ruling that First American had breached the insurance contract by failing to promptly appoint an appraiser, despite the trial court's other rulings that (1) First American had already paid plaintiff all the benefits she was entitled to receive under the Policy, before appraisal, and (2) plaintiff had not been materially damaged by this "breach." First American had no duty to submit to appraisal damages that were not caused by the covered water loss event. Additionally, as a matter of law, First American cannot be liable for breach of contract if there are no resulting damages.

The Policy does not require appraisal of claims that are not covered under the Policy. In light of the trial court's finding that First American had paid the full covered loss before

appraisal, First American could not have breached the Policy.

There can be not breach of the Policy for failing to submit non-covered alleged damages to appraisal.

Instead of demonstrating that First American's arguments regarding applicable law and facts are flawed, plaintiff simply asserts that "[t]here is really no serious dispute that Defendant committed a material breach of contract." Plaintiff's Brief, p. 68. Plaintiff does not provide any argument or authority for the contention that First American may be liable for breach of contract, in the absence of damages.

Plaintiff argues that damages were established when Judge Veljacic confirmed the appraisal awards. *Id.* at 69. As the trial court found, however, First American had already paid to plaintiff more than the amount of the covered Water Damage appraisal award, when those awards were confirmed. The Mold Damage appraisal award was not covered by the Policy and, therefore, cannot be considered damages resulting from any alleged breach of contract. Plaintiff fails to show that she

suffered any damages or loss as a result of the alleged breach of contract; the alleged damages she was pursuing through the appraisal process were not covered by the Policy.

For the reasons set forth in First American's Opening Brief, and above, Judge Veljacic's intermediary ruling requiring appraisal did not establish a breach of contract on the part of First American. After the appraisal rulings, Judge Veljacic subsequently denied plaintiff's motion for partial summary that First American had breached the insurance contract, confirming that he had not previously found a breach of contract.

The trial court's ruling that First American had breached the Policy's appraisal requirement simply cannot be reconciled with the trial court's finding that First American had already satisfied its contractual payment duties under the Policy, at that time, as a matter of law. The trial court's ruling that First American breached the appraisal provision in the Policy should be reversed.

B. Plaintiff Fails to Establish that She Is Entitled to Any Attorney Fees Pursuant to *Olympic Steamship*.

First American's second assignment of error argues that the trial court erred in awarding attorney fees to plaintiff, on an equitable basis and pursuant to *Olympic Steamship*, for bringing her motion to compel appraisal and for partial summary judgment that First American had to continue paying Loss of Use/ALE benefits during the dispute.

Plaintiff's response sets forth no new or additional arguments or authorities not previously discussed in the context of plaintiff's eighth and ninth assignments of error, which sought additional attorney fees. First American's responses to plaintiff's eighth and ninth assignments of error are incorporated as its reply in support of its second assignment of error. Those authorities and arguments, in addition to those in First American's Opening Brief, establish that the trial court erred in awarding any attorney fees to plaintiff.

C. The Trial Court’s Factual Findings and Rulings Establish Misrepresentation as a Matter of Law.

The Policy expressly provides that First American provides no coverage if, after a loss, an insured has “[i]ntentionally concealed or misrepresented any material fact or circumstance” or engaged in fraudulent conduct relating to the insurance. CP 2019-10. First American asserted a misrepresentation or fraud affirmative defenses, in light of plaintiff’s multiple misrepresentations to First American and the court.

The trial court agreed that many of plaintiff’s assertions were incorrect and that plaintiff knew they were incorrect. For example, the trial court found that plaintiff’s expert, Jason Kester, “did not address causation of the mold he found in the home.” CP 2340 ¶21. This finding is supported by the text of his report, Trial Exhibit 5; CP 826-33 (which does not mention the October 2017 water loss event), and his testimony, discussed above. Despite this, plaintiff asserted to First American and the court that the report did find that the

October 2017 event caused the possible mold in the home. *See, e.g.,* RP 30-31 (plaintiff’s counsel contending that the Kester report prescribes “what needs to be done to return the house to pre-loss condition”).

The trial court found that Adam Blagg, plaintiff’s appraiser, “should have known through his inspection of the Home and its contents that his appraisals included damages to the Home and contents that were not attributable to the water loss event.” CP 2341, ¶26. The trial court also found that plaintiff knew Adam Blagg’s estimates and Jason Kester’s mold investigation report were “used to leverage potential settlement in her claims against the prior owners.” CP 2341, ¶29; CP 2342, ¶30. “Montler knew or should have know[n] that Adam Blagg’s appraisal of the Home and contents included damages that were potentially attributable to water damage that pre-dated Montler’s purchase of the Home.” CP 2342, ¶31.

The trial court imposed a discovery sanction against plaintiff for her failure to produce, during discovery, correspondence showing that she used the same Blagg appraisal and Kester report to demand settlement in her suit against the prior owners as she used to claim mold damage caused by the October 2017 water loss event. CP 2706-13. In light of the misrepresentation found by the trial court, which are supported by substantial evidence, First American should have prevailed on its misrepresentation affirmative defense as a matter of law.

Plaintiff's response to First American's third assignment of error attacks First American's motives in bringing the defense and repeats the erroneous assertions that the damages plaintiff asserted in her the *Yang* lawsuit did not overlap in any manner with the damages she sought in her suit against First American. As discussed above, the SGAL in the *Yang* lawsuit reviewed no reports or information regarding plaintiff's claims against First

American and, certainly, had no authority to find any facts or make any rulings in this case.

Plaintiff's settlement demand letter in the *Yang* lawsuit speaks for itself. This Court can read plaintiff's assertion that the *Yang* defendants "are responsible" for identical repair costs and other expenses that plaintiff sought from First American. *See* Trial Exhibit 172; CP 1812. "[I]f this settlement offer is rejected," plaintiff wrote, "we will pursue cost of repair and contents and hotel expenses from the Defendants in this case, as well as potential additional damages for toxic exposure." *Id.* Plaintiff's attempt to recharacterize the letter fails, in light of the wording of the letter itself.

Plaintiff points to her assertions that the damages sought in the two cases were wholly separate to argue that First American "was informed" the damages were separate. Plaintiff's Brief, p. 74-75. To the contrary, these are the very misrepresentations that establish First American's affirmative defense.

Plaintiff also argues that First American failed to establish the elements of a fraud claim. *Id.* at pp. 78-81. First American does not assert a fraud claim against plaintiff, however. *Baertschi v. Jordan*, 68 Wn.2d 478 (1966), cited by plaintiff, Plaintiff's Brief, p. 79, is not relevant, because First American is making no attempt "to recover for fraud," as in *Baertschi*, 68 Wn.2d at 482. The elements of a fraud claim are not applicable.

First American's misrepresentation affirmative defense seeks to enforce the terms of the insurance contract. "Washington courts have upheld 'void for fraud' provisions where the policy expressly states that an insured is not entitled to coverage if that insured intentionally misrepresents or conceals a material fact regarding a claim and that such misrepresentations will void the entire policy." *Ki Sin Kim v. Allstate Ins. Co.*, 153 Wn. App. 339, 354 (2009), *as amended* (2010) (citing authorities). "Courts will enforce such a clause regardless of whether the misstatements prejudiced the

insurance company.” *Id.* “An insured need only make one material misrepresentation to void all coverage under the entire policy.” *Id.* (citing *Onyon v. Truck Ins. Exch.*, 859 F.Supp. 1338, 1341 (W.D. Wash. 1994)).

A misrepresentation is material if a reasonable insurance company would attach importance to the misrepresented fact. *Onyon*, 859 F.Supp. at 1341; *Ki Sin Kim*, 153 Wn. App. at 355. If an insured knowingly makes untrue representations, “courts will presume that the insured intended to deceive the insurance company.” *Ki Sin Kim*, 153 Wn. App. at 355 (citing *Kay v. Occidental Life Ins. Co.*, 28 Wn.2d 300, 301 (1947)).

Given the material misrepresentations admitted by plaintiff and acknowledged by the trial court, the trial court erred in ruling that First American had not established that plaintiff intentionally or materially misrepresented or concealed material information from First American. First American asks this Court to reverse that erroneous ruling.

D. CR 11 Sanctions Should Have Been Awarded, in Light of the Misrepresentations by Plaintiff and Her Counsel.

Plaintiff's response to First American's fourth assignment of error discusses a Motion to Disqualify filed by First American in February 2021. Plaintiff's Brief, p. 81-82; *see* CP 1158-73 (First American's motion). This motion concerned *ex parte* communications by plaintiff's counsel and Mr. Blagg to First American. *Id.*

First American's Motion for Attorney Fees as a CR 11 Sanction does not cite or rely on these prior *ex parte* communications in any manner. *See* CP 2409-22. It is unclear why plaintiff's brief makes arguments regarding this prior dispute between the parties, which is wholly irrelevant to First American's CR 11 motion and the fourth assignment of error.

Instead of explaining why his misrepresentations do not justify a sanction pursuant to CR 11, plaintiff's counsel raises accusations of misrepresentations against First American's counsel—accusations that have long ago been discredited. *See*

CP 2517 (responding to plaintiff's similar arguments in response to First American's CR 11 motion).

Plaintiff recycles disproven attacks upon First American's counsel that have repeatedly been found to lack merit. Counsel is not a party to this suit. First American declines to "take the bait" and respond to plaintiff's personal attacks. These personal attacks on First American's counsel (and on the trial court) should be disregarded by this Court.

In light of the clear evidence and findings of misrepresentations to the trial court, the trial court erred in failing to award impose sanctions on plaintiff or her counsel. First American asks this Court to reverse that ruling and remand to the trial court for determination of an appropriate sanction, including attorney fees.

VI. RESPONSE TO REQUEST FOR ATTORNEY FEES

Plaintiff submits a request for attorney fees on appeal pursuant to RAP 18.1. RAP 18.1(a) allows a party to request

attorney fee or expenses on appeal “[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review[.]” Plaintiff does not cite to any statute or rule that would entitle plaintiff to fees on appeal, but contends that “the rationale of *Olympic Steamship*” should apply and provide plaintiff with a right to fees.

Plaintiff is not entitled to fees because she was not the prevailing party at the trial court and will not prevail on her arguments to this Court, either.

VII. CONCLUSION

This case presented a clear-cut dispute as to whether certain prior/mold-related damages claimed by plaintiff were caused by the covered cause of loss and thus covered by the insurance policy. Plaintiff attempted to circumvent the coverage/causation dispute by demanding appraisal of the disputed damages. The trial court erred in compelling appraisal of those damages, given the coverage/causation dispute. After a full trial, the trial court agreed with First American that the

mold-related damages were not caused by the covered cause of loss and not covered by the Policy.

Despite this conclusion, and despite finding that First American had promptly investigated and paid plaintiff all that she was entitled to receive under the Policy, the trial court held that First American had breached the insurance contract. This ruling was erroneously as a matter of law. This Court should reverse that ruling and the award of attorney fees associated with plaintiff's motion to compel appraisal.

Throughout this litigation, plaintiff and her representatives have repeatedly and knowingly misrepresented facts and withheld relevant information. The trial court erred when it failed to rule in First American's favor on its fraud and misrepresentation affirmative defense and failed to impose a CR 11 sanction, including attorney fees.

Pursuant to RAP 18.17, this document is proportionately spaced using Times New Roman 14-point font and contains

11,959 words, excluding the caption, tables, signature blocks,
and certificate of service (word count by Microsoft Word).



Robert S. May, WSBA No. 36116

Rmay@kilmerlaw.com

Holly E. Pettit, WSBA No. 46424

hpettit@kilmerlaw.com

2701 NW Vaughn Street, Suite 780

Portland, Oregon 97210

Phone No.: 503-224-0055

Dated: October 6, 2022


CERTIFICATE OF SERVICE

I certify that on the 6th day of October, 2022, I caused a true and correct copy of this REPLY BRIEF OF APPELLANT/CROSS RESPONDENT FIRST AMERICAN PROPERTY & CASUALTY INSURANCE CO. to be served on the following in the manner indicated below:

Calvin P. "Kelly" Vance
1066 S. Breezy Way
Post Falls, ID 83854
(208) 262-8115
moldlawyer@aol.com

(x) U.S. Mail and email
() Hand Delivery

Counsel for Respondent

By:  _____

Robert S. May, WSBA No. 36116

Rmay@kilmerlaw.com

Holly E. Pettit, WSBA No. 46424

hpettit@kilmerlaw.com

2701 NW Vaughn Street, Suite 780

Portland, Oregon 97210

Phone No.: 503-224-0055

KILMER VOORHEES & LAURICK PC

October 06, 2022 - 5:06 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 56276-6
Appellate Court Case Title: Marianne Montler, Resp/Cross-App v. Belfor USA Group, Inc., et al, App/Cross-Resp
Superior Court Case Number: 18-2-05942-2

The following documents have been uploaded:

- 562766_Briefs_20221006170215D2084640_2873.pdf
This File Contains:
Briefs - Appellants/Cross Respondents
The Original File Name was Reply Brief of Appellant-Cross-Respondent First American.pdf

A copy of the uploaded files will be sent to:

- Moldlawyer@aol.com
- rmay@kilmerlaw.com

Comments:

Sender Name: Jennifer Miller - Email: jmiller@kilmerlaw.com

Filing on Behalf of: Holly Elizabeth Pettit - Email: HPettit@kilmerlaw.com (Alternate Email:)

Address:
2701 NW Vaughn Street Suite 780
Portland, OR, 97210
Phone: (503) 224-0055 EXT 227

Note: The Filing Id is 20221006170215D2084640